IN THE

Supreme Court of the United States

October Term, 1973.

No. .

FORREST MURPHY, VIRGINIA W. MURPHY, FORREST J. MURPHY, JERRY J. MURPHY, and MARY V. MURPHY, Doing Business as UTAH OIL LAND COMPANY, a Partnership,

Petitioners,

v.

LEONARD LANDSBURG, Individually and as Trustee of the Estate of ADOLPH L. TAFEL, Deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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FORREST MURPHY, VIRGINIA W. MURPHY, FORREST J. MURPHY, JERRY J. MURPHY, AND MARY V. MURPHY, DOING BUSINESS AS UTAH OIL LAND COMPANY, A PARTNERSHIP,

Petitioners,

v.

LEONARD LANDSBURG, INDIVIDUALLY AND AS TRUSTEE OF THE ESTATE OF ADOLPH L. TAFEL, DECEASED,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on December 28, 1973.

OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania is not reported. A copy thereof is appended to this petition in the Appendix at pages A1-A11.

The opinion of the Court of Appeals for the Third Circuit is not reported. A copy thereof is appended to this petition in the Appendix at pages A12-A20.

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was made and entered on December 28, 1973, and a copy thereof is appended to this petition in the Appendix at pages A21-A22.

Jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

1. Whether summary judgment may be entered where there is a genuine issue as to a material fact.

2. Does the doctrine of collateral estoppel bar a subsequent proceeding where

(a) the court in the first proceeding did not expressly rule on the common issue but at most did so by implication; and

(b) the party against whom it is applied in the second proceeding was (i) not a party to the first, (ii) had no standing therein, and (iii) had no standing to appeal the decision in the first proceeding?

RULE INVOLVED.

The rule involved is Rule 56(c) Federal Rules of Civil Procedure, viz.:

> (c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATEMENT OF THE CASE.

Jurisdiction of the district court was founded upon 28 U. S. C. § 1332(a)(1). The action is for breach of a contract for the sale of stock in a close corporation.

In 1971, respondent Leonard Landsburg, as Trustee of the Estate of Adolph L. Tafel, Deceased, was the owner of 750 shares of the capital stock of Boericke & Tafel, Inc. (B&T), of Philadelphia, Pennsylvania. Petitioner Forrest Murphy, on behalf of petitioner Utah Oil Land Company, a partnership, of St. Louis, Missouri, submitted an offer in writing to purchase all the outstanding shares of B&T (R. 7a-9a).[1] The offer provided that "[i]f the number of shares tendered in response hereto is less than the number of shares required to effect a complete liquidation of the B&T Corporation then this offer may be declared by the purchasers to be null and void."

Two days later Landsburg, through his attorney, accepted the offer as to the 750 shares which he held, subject only to the approval of the orphans' court of Philadelphia, and stated that "[t]his is a binding agreement on both your part and upon ours as representatives of the Tafel Trust." (R. 10a-11a). Landsburg also agreed to try to obtain the additional shares necessary to give plaintiffs control of B&T (R. 10a).

In conformity with the terms of the contract, and in response to Landsburg's acceptance letter, Murphy established a joint bank account with Landsburg's attorney to pay for the additional shares which Landsburg had agreed to solicit (R. 18a, 86a-89a).

From time to time Murphy extended the expiration date of the offer, the last such extension being until January 15, 1972 (R. 15a).

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1. References herein to the record are to the printed record in the court of appeals which the clerk of that court has been requested by petitioners to certify and transmit to this Court.

On November 23, 1971, Murphy orally notified Landsburg's attorney that he did not wish to delay the closing of the transaction any longer and that he waived the right reserved to petitioners to declare the offer null and void for want of control (R. 39a). On November 27, 1971, however, Landsburg's attorney told Murphy that his client wished to try for a higher price for the shares and that he intended to solicit sealed bids (R. 40a). On or about December 1, 1971, Landsburg accordingly mailed solicitations for bids (R. 80a).

On December 3, 1971, Murphy, through his attorney, notified Landsburg by letter of his desire to complete the purchase of the 750 shares and of petitioners' waiver of their right to rescind the offer (R. 16a). Murphy also sent Landsburg a cashier's check in the amount of $37,500, representing the first of five annual payments provided for in the contract (R. 90a, 16a).

By letter dated December 13, 1971, Landsburg notified Murphy that he had sold the 750 shares to B&T at a higher price and returned the cashier's check (R. 41a). On January 4, 1972, pursuant to a petition filed by Landsburg, a hearing was held in the Orphans' Court Division of the Court of Common Pleas of Philadelphia County, Pennsylvania. The petition set forth both sales of the 750 shares and requested that the sale to B&T be approved (R. 91a-95a). Murphy, though neither he nor the other petitioners was a party to the proceeding in the orphans' court (R. 91a-95a, 145a), appeared at and participated in the hearing (R. 145a et seq.). The court approved the sale to B&T solely on the ground that it gave the estate "top dollar" for the stock (R. 228a).

On February 8, 1972, petitioners filed the action at bar in the United States District Court for the Eastern District of Pennsylvania seeking, inter alia, damages for the breach

of their contract. On February 15, 1972, the orphans' court entered an order directing sale of the stock to B&T. A motion for a preliminary injunction to restrain the transfer of the stock was denied by the district court on May 11, 1972. Thereafter, following pretrial discovery, all parties moved for summary judgment. The district court granted respondent's motion as to Counts I and II of the complaint and denied all other motions. Petitioners appealed to the court of appeals which affirmed the decision of the district court.

REASONS FOR GRANTING THE WRIT.

The writ should be granted because the court of appeals has decided a federal question in a way in conflict with applicable decisions of this Court, and has decided an important state question in a way in conflict with applicable state law.

1. A central issue in the case is whether petitioners waived their option to withdraw their original offer to purchase the stock if less than a sufficient number of shares to give them control of the corporation were tendered. Petitioner Murphy testified that he orally waived the option in a telephone conversation with respondent's attorney (R. 39a, 73a). Respondent's position is that his attorney demanded that the waiver be presented in writing (R. 54a, 281a-282a). Petitioner Murphy testified that he does not recall such a demand (R. 79a). It is clear that neither petitioners' proposal to purchase the stock nor respondent's acceptance requires either the exercise of the option or its waiver to be in writing (R. 7a-11a).

Some of the testimony was presented in court at the preliminary injunction hearing, and some by deposition in connection with the summary judgment motion. The district judge who entered summary judgment, however, was not the same one who held the hearing on the preliminary injunction (R. 26a, 341a, 346a). He thus has never had an opportunity to see and hear the witnesses and to decide the vital question of their credibility on this (and other) issues of fact. It was not possible on the record before him for the district judge to determine that "it is quite clear what the truth is." *Poller v. Columbia Broadcasting Systems*, 368 U. S. 464 (1962). His examination of the record should have been in the light most favorable to petitioners, in which case summary judgment patently should have not been granted.

The court of appeals was equally unable to tell where the truth lay, nor did it view the record before it in the light most favorable to petitioners. It contented itself with the observation (Appendix, p. A15):

> *Although disputed,* Lawler claimed that he told Murphy to put the waiver in writing. [Emphasis added.]

Petitioners have thus been unlawfully cut off from their right to a trial, *Poller, supra,* by the decision of the court of appeals which, though recognizing the existence of a dispute over a material fact, affirmed summary judgment. See *Norfolk Monument Co., Inc. v. Woodlawn Memorial Gardens, Inc.,* 394 U. S. 700 (1969).

The threshold issue in the case is whether there was a contract between the parties, and, if so, whether respondent was under a duty to seek approval of it by the orphans' court. Judge Weiner, the district judge before whom petitioners' motion for preliminary injunction was heard, made findings of fact and conclusions of law as provided by Rule 52, Federal Rules of Civil Procedure. He specifically found that there was a contract between the parties but was of the opinion that the issues of law and fact involved in the action were sufficiently complex as to require the refusal of a preliminary injunction (R. 341a-345a).

Judge Bechtle, the district judge before whom were the various motions for summary judgment, made no specific findings as required by Rule 56(d), Federal Rules of Civil Procedure. In his opinion, however, he stated that "[t]he testimony in the depositions of the trustee's [respondent's] attorney *raises considerable doubt* whether a contract was entered into . . ." (R. 348a). [Emphasis added.] He also held that either petitioners or respondent could have sought the requisite approval from the orphans' court (ibid.), even though respondent expressly undertook to seek that ap-

proval (R. 18a, 86a), and petitioners lacked standing to do so. (See page A4, *infra*.)

Against the foregoing backdrop the court of appeals held (Appendix, p. A19):

> The position of the parties in the district court and in the Orphans' Court is essentially the same, Murphy asserting the existence of an obligation by Landsburg to submit Murphy's proposal to the Court before soliciting any other bids, and Landsburg denying it.

The court of appeals thus clearly recognized the importance of the issue. However, in footnote 5, id., it further said:

> It does not appear that the district court ruled on the question of whether Landsburg was under a binding obligation to submit Murphy's proposal to the Orphans' Court. *In view of the lack of factual findings on the issue* and because of our disposition of this case on the ground of collateral estoppel, we decline to rule on this matter. [Emphasis added.]

Despite, then, the specific findings by Judge Weiner that there was, indeed, a contract and that there were complex issues of law and fact in the case; despite Judge Bechtle's belief that there was "considerable doubt" whether there was a contract and his lack of factual findings on the issue whether respondent was under a duty to seek orphans' court approval; in spite of these facts the court of appeals affirmed summary judgment.

2. As the court of appeals noted, in this diversity case the law of Pennsylvania in respect to *res judicata* and collateral estoppel applies, *Blum v. William Goldman Theatres*, 174 F. 2d 914 (3d Cir. 1949), and Pennsylvania follows the Restatement of Judgments. *Thal v. Krawitz*, 365 Pa. 110, 73 A. 2d 376 (1950).

The court of appeals also correctly held that *res judicata* does not apply, since the proceedings in the orphans' court and in the district court involved different objectives and relief. Where the court of appeals erred was in applying the doctrine of collateral estoppel.

(a) The orphans' court had before it respondent's petition for approval of the sale of the stock to B&T (R. 93a). Although petitioner Murphy was present at the hearing, testified, and was permitted otherwise to participate, the court's concern was directed solely to the question whether to approve the sale as requested. At the conclusion of the hearing the judge said (R. 228a):

> THE COURT: Now, Mr. Murphy, I understand what your position is but I think that your so-called contract was not completed [*sic*] adopted and was not binding at the time; certainly without court approval it was not binding on the trustee. If the Court would have approved it it would have been binding. *But the Court was never asked to approve it because I am now being asked to approve a much better contract.* It is my responsibility to see that trusts under my supervision get the top dollar, whether it is in the selling of a house or a business or selling control of a business. [Emphasis added.]

In the face of the foregoing, the court of appeals held that "[i]n approving this bid, the Court *in effect* made an adjudication that Landsburg had no prior binding agreement with Murphy", and that "[w]hile the Court *did not expressly rule* on the question . . . we believe that *such a ruling can be fairly implied.*" [Emphasis added.] The court of appeals also expressed "doubt that [the orphans' court] would have approved the offer of another party" if it had found that respondent had a contractual obligation to petitioners.

Although the court of appeals recognized that Section 68 of the Restatement of Judgments is the law of Pennsylvania and quoted from it at length, it gave no consideration to the requirement that the question of fact be "actually litigated and determined" for collateral estoppel to be applicable. It is submitted that "actually determined" is not the equivalent of "fair implication" that a determination was made, or of "doubt" that a court would have so acted unless a determination was made.

Moreover, it was not essential to the orphans' court approval of the sale to B&T to find that there was no contract between petitioners and respondent. It might well have found that there was, indeed, a contract as petitioners contend yet it could have nevertheless approved the sale to B&T. See Corbin on Contracts, § 649; Williston on Contracts (3d ed.), § 666.[2] The issue, then, whether there was a contract with petitioners not being essential to the result reached by the orphans' court, its supposed or inferred determination of the question operates as no bar to the present action. *Thal v. Krawitz, supra; Larsen v. Larsen,* 392 Pa. 609, 141 A. 2d 353 (1958).

In *Township of Ohio v. Builders Enterprises, Inc.*, 2 Pa. Commonwealth Ct. 39, 276 A. 2d 556 (1971), affirmed per curiam, 446 Pa. 319, 284 A. 2d 686 (1971), it was specifically held that the conclusive effect of a judicial decision cannot be extended by argument or implication. And *Haefele v. Davis,* 399 Pa. 504, 160 A. 2d 711 (1960) requires that for collateral estoppel to bar a subsequent proceeding it must be established that the former decision "*necessarily* involved . . . the consideration and determination" of the common issue. [Emphasis added.]

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2. Of course, had the court found that there was a contract it would not have been enforceable without the agreed requisite court approval.

(b) Petitioner Murphy, though not a party to the orphans' court proceeding, did appear at the hearing, testified, and, while not an attorney, cross-examined witnesses and presented argument (R. 145a-229a). By this participation in the proceedings, however, he and the other petitioners did not become bound by the decision of the court.

In *Albert v. Lehigh Coal and Navigation Company*, 431 Pa. 600, 246 A. 2d 840 (1968), the Supreme Court of Pennsylvania held, 431 Pa. at 613:

> To be concluded by a prior decree or judgment one must be a party to the action, or what is equivalent thereto, with a right to control the proceedings and take an appeal. *Stonecipher v. Keane*, 268 Pa. 540, 112 A. 233 (1920).

In *Stonecipher* the court held that "the fact that he appeared as an attorney and witness did not render him a party to the suit nor give him control over it," 268 Pa. at 546, and hence he was not concluded by the judgment of the court.

Further, it appears that petitioners lacked standing both in the orphans' court and to take an appeal from its decision. In *Nevil Trust (No. 2)*, 13 Pa. Fiduciary Rep. 178 (1963), affirmed sub nom. *Nevil Estate*, 414 Pa. 122, 199 A. 2d 419 (1964), a charitable institution filed a petition in orphans' court to review and correct an adjudication in an estate in which it was not a named beneficiary and which was distributed under the *cy pres* doctrine to other similar institutions. The Attorney General of Pennsylvania filed preliminary objections to the petition on the ground, inter alia, that "[p]etitioner is not a party in interest and has not standing or capacity to bring this action." Id., p. 180. The court held, p. 184, "It further follows that the petitioner . . . has no standing to request a review of the adjudication."

In *Curtis Estate (Salke Appeal)*, 437 Pa. 117, 262 A. 2d 851 (1970), an orphans' court approved the sale of real property by the trustee. Thereafter, a petition to set aside the sale, and a petition by another to intervene, were filed and allowed. The Supreme Court of Pennsylvania said, 437 Pa. at 126, note 3, with regard to those petitioners:

> Although we have grave doubts as to the standing of all appellees except the trustees and the three contingent beneficiaries, we do not express an opinion on the question because no objection was raised below and because our disposition makes the issue immaterial in the context of this case.

Thus, in Pennsylvania the only persons with standing in a proceeding before an orphans' court to approve a sale of trust property or to distribute the assets of an estate are those directly interested in the estate itself—e.g., the trustee, beneficiaries, creditors, and—in the case of a charitable trust—the attorney general. A purchaser of estate assets is not such a person and therefore has no standing before the court. As the Supreme Court of Pennsylvania said, 437 Pa. at 129:

> After all, the only reason that the court becomes involved at all in these matters is to protect the beneficiaries' interest in seeing that the trustees discharge their duties faithfully and in the best interest of the trust.

Since petitioners lacked standing both in the orphans' court and to take an appeal from its decision, they cannot under Pennsylvania law be estopped by the decision of that court from maintaining the action at bar.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

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JERRY J. MURPHY.

APPENDIX

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION NO. 72-278.

FORREST MURPHY, VIRGINIA W. MURPHY, FORREST J. MURPHY, JERRY J. MURPHY, AND MARY V. MURPHY, DOING BUSINESS AS UTAH OIL LAND COMPANY, a PARTNERSHIP

v.

LEONARD LANDSBURG, INDIVIDUALLY AND AS TRUSTEE OF THE ESTATE OF ADOLPH L. TAFEL, DECEASED

AND

BOERICKE & TAFEL, INC., A PENNSYLVANIA CORPORATION

AND

DONALD LEE

AND

GUSTAV H. TAFEL, JR., INDIVIDUALLY AND AS EXECUTOR AND TRUSTEE UNDER THE WILL OF ELEANOR TAFEL, DECEASED.

MEMORANDUM OPINION.

BECHTLE, *J.* January 30th, 1973

The four members of the partnership, Utah Oil Land Company, bring the action here involved seeking a variety of relief against four defendants.[1] The complaint is in six

1. United States District Judge Charles R. Weiner, in a Memorandum Opinion and Order filed in this case on May 12, 1972, denied

counts. Under the first two and the last two counts, the partnership seeks damages from Leonard Landsburg, individually and as Trustee of the Estate of Adolph L. Tafel, deceased. Counts I and II are for breach of an alleged contract between the partnership and the trustee; Counts V and VI are for the trustee's alleged violation of the Federal securities anti-fraud statutes and SEC Regulation 10b-5. The prayer for relief in each of Counts I and II has been amended by stipulation to include a request that the trustee be ordered to sell and transfer to the partnership the 750 shares of Boericke and Tafel, Inc. ("B & T"), stock held by him as trustee, in accordance with the terms of the alleged contract between him and the partnership. The remaining counts, Counts III and IV, seek damages from the other three defendants (B & T; Donald Lee, president and director of B & T; and Gustav H. Tafel, Jr., a director of B & T) for asserted malicious interference with the contractual relationship between the partnership and the trustee for the sale of the 750 shares of B & T stock.[2] The partnership also asks for a declaration that B & T be deemed trustee *ex maleficio* of the 750 shares "obtained" from the trustee of the estate and be required to make restitution to the partnership. B & T has filed a counterclaim averring that the partnership and its members, by soliciting the sale of the 750 shares from the majority stockholder and by institution of this action to enforce the contract for the sale of the shares, are attempting to monopolize commerce among the several states in homeopathic pharmaceuticals in violation of the Sherman and Clayton Antitrust Acts.

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1. (Cont'd.)
the partnership's action for a preliminary injunction and granted the partnership's motion to dismiss a counterclaim asserted by the trustee Leonard Landsburg.

2. The directors of B & T are four in number. The trustee and his brother are the other two. The brother was not named as a defendant.

Trustee Landsburg has moved for summary judgment in his favor seeking dismissal of Counts I, II, V and VI of the complaint. In response, the partnership has filed a cross-motion for summary judgment under those counts and for similar relief against the other three defendants under Counts III and IV. The partnership has also filed its motion for summary judgment seeking dismissal of B & T's counterclaim, which avers the antitrust violations. The three other defendants have cross-motioned for summary judgment as to the partnership's claim against them. These motions are now before me for determination.

I. Plaintiffs' and Trustee's Cross-Motion for Summary Judgment Under Counts I and II.

The basis for the partnership's claim for breach of contract is that the trustee, by letter dated July 9, 1971 (Complaint, Exhibit "B"), accepted its offer of a few days earlier to buy all of the 1,365 outstanding shares of B & T common stock by agreeing to sell 750 shares held by him. This is set forth in Count I. Alternatively, it alleges in Count II that, if the letter of July 9 be considered a counteroffer, it was accepted by the partnership as evidenced by the partnership's letter (Complaint, Exhibit "D") of December 3, 1971.

The testimony in the depositions of the trustee's attorney raises considerable doubt whether a contract was entered into for the sale of the 750 shares under either theory. In addition, on three separate occasions, the partnership extended by letter the effective date of its offer submitted July 7, 1971, to give the minority stockholders an opportunity to act on the offer, the last extension date being December 1, 1971, for that purpose. Nevertheless, assuming that there was a sale, the trustee's letter of July 9, whether it be construed as an "acceptance" or a "counteroffer," contained an indispensable condition that it was

"subject only to the approval of the Orphans' Court." Either the partnership or the trustee could have sought that approval, as the burden of seeking such action was not restricted to only one of them. Before Orphans' Court approval was sought and pursuant to a request for bids (containing a like condition for Orphans' Court approval), B & T submitted a bid to purchase the 750 shares, which the trustee accepted because he believed that it was better than the offer made by the plaintiff partnership.

United States District Court Judge Charles R. Weiner, of this Court, rendered a decision on certain other preliminary matters heretofore and, in his Memorandum Opinion of May 12, 1972, he stated:

> "On January 4, 1972, a hearing was held before the Orphans' Court on the petition of [the truseee]. The petition referred to both sales and requested that the sale to B & T be approved. The Court approved this request on the basis that the proposed sale to B & T was at a substantially higher price than that provided for in [the partnership's] contract . . ."

Since the sale to the partnership has not been approved by the Orphans' Court, an important condition precedent to consummation of the sale has not been met. Therefore, the partnership is not entitled to recover damages from trustee Landsburg, in his official or individual capacity, nor can specific performance be decreed. Accordingly, trustee Landsburg is entitled to judgment dismissing the action under Counts I and II.

In considering plaintiffs' cross-motion for summary judgment of these counts, one other observation is pertinent. Even if I were to rule that the sale did not require the approval of the Orphans' Court, the partnership could still not prevail at this time since it must meet, and indeed ultimately overcome, B & T's counterclaim that the acqui-

sition or attempted acquisition of the 750 shares of stock would be a violation of the antitrust laws. Only after this occurrence would plaintiffs be given consideration to any entitlement for relief based on a breach of contract.

II. Plaintiffs' Motion for Summary Judgment Seeking Dismissal of B & T's Counterclaim.

The partnership's motion for summary judgment seeking dismissal of B & T's counterclaim must be denied. Paragraphs 29, 30, 31 and 32 of B & T's answer to the complaint aver as follows:

> "29. Defendant B & T is exclusively engaged in the business of manufacturing and selling homeopathic pharmaceutical products and in publishing literature with respect thereto. It is one of the major producers of such pharmaceuticals in the United States.
>
> "30. Wise K. C. Pharmical Company (Wise), Layties Pharmical Company (Layties), Walker Pharmical Company (Walker), New Era Labs, Limited (New Era), and Inland Alkaloid Company (Inland) are all companies engaged in the manufacture and sale of homeopathic products in the United States.
>
> "31. Plaintiff Forrest Murphy is President and Director of Wise, Layties, Walker and New Era, is a Director of Inland, and is an officer of other concerns engaged in the homeopathic pharmaceuticals industry.
>
> "32. Each of the individual plaintiffs has an economic interest in Wise, Layties, Walker and New Era, Inland and other concerns engaged in the homeopathic pharmaceutical industry and, together, they are the controlling stockholders thereof."

The partnership does not dispute the allegations of paragraph 29, and the deposition of Forrest Murphy, one of the members of the partnership, supports the allegations of the remaining three paragraphs. Thus, the offer of the partnership to buy the majority shares of outstanding B & T stock may have violated the antitrust laws. Although I have ruled that the partnership is not entitled to damages for breach of contract or for specific performance, the offer and the proceedings to enforce the transfer of the 750 shares may have prevented B & T from carrying on a more aggressive business and, thus, decreased its profits. If B & T can prove the antitrust violation, it should be given an opportunity to show that its profits were less than they would have been but for the partnership's action.

III. Trustee's Motion and Plaintiffs' Cross-Motion for Summary Judgment Under Counts V and VI.

The plaintiff partnership avers in Counts V and VI that the trustee Landsburg, using the facilities of interstate commerce, employed a fraudulent scheme to deceive the partnership to enter into negotiations with him to buy 750 shares of B & T stock in order to induce B & T to purchase the same stock at a price higher than that which the partnership had agreed to pay and to thereby profit at the partnership's expense.[3] It has been held in this district that a plaintiff seeking to recover damages pursuant to § 10(b) of the 1933 Act and SEC Rule 10b-5 must establish that he has suffered injury as a result of deceptive practices in connection with his purchase or sale of securities. *In re Penn Central Securities Litigation*, 347 F. Supp. 1327, 1333-1334 (E. D. Pa. 1972)—where some of the plain-

3. At this point, it should be noted that B & T has not filed a cross-claim against the trustee.

tiffs acquired stock in a Penn Central Company before and held it throughout defendants' alleged illegal activity; *Edelman v. Decker,* 337 F. Supp. 582, 587 (E. D. Pa. 1972) —where a plaintiff held shares of stock of a bank and decided not to sell them pursuant to statements in proxy material which he later learned were misleading. But see *Commerce Reporting Co. v. Puretec, Inc.,* 290 F. Supp. 715 (S. D. N. Y., 1968)—where the allegations in a complaint resemble more closely those under Counts V and VI of the complaint in the action before me. The court ruled that it is unnecessary to allege a consummated purchase or sale of securities as a condition to maintaining an action under § 10(b) and Rule 10b-5. And, in the case of *Kahan v. Rosenstiel,* 424 F. 2d 161, 173 (CA 3, 1970),[4] where Circuit Judge Adams, speaking for the Court, said regarding adherence to a strict purchase-seller requirement: "The [1934] Act was designed to eliminate deceptive and unfair practices in security trading and to protect the public from inaccurate, incomplete and misleading information. The thrust of the Act and the decisions interpreting it is to give the investing public the opportunity to make knowing and intelligent decisions regarding the purchase or sale of securities. A suit which seeks to enjoin deceptive practices which if continued would *lead to* completed purchases or sales that give rise to a cause of action under § 10(b) is not inconsistent with this policy and will in fact promote free and open public securities markets." (Emphasis added.)[5]

However, I need not decide whether the partnership may invoke the provisions of § 10(b) and Rule 10b-5. The

4. *Cert. denied sub nom. Glen Alden Corp. v. Kahan,* 398 U. S. 950, 90 S. Ct. 1870, 26 L. Ed. 2d 290 (1970).

5. Here the partnership does not seek to enjoin any deceptive practices but asks that the trustee be required to sell and transfer the 750 shares to it.

partnership has not intimated that it will be at a disadvantage by relying on state law rather than Federal. This Court has jurisdiction over the subject matter by reason of diversity and amount in controversy; all the parties involved are before the Court and there would have been no necessity to resort to § 27 of the 1934 Act to obtain personal jurisdiction over defendants. Whether or not the partnership proceeds under Federal or state law, there is a genuine issue of fact as to the claim under these counts and the motions of the respective parties under them will be denied.

IV. Motion of Plaintiffs and Defendants Lee, Tafel and B & T for Summary Judgment Under Counts III and IV.

As mentioned earlier, the partnership seeks damages against the other three defendants (B & T, Lee and Tafel) for malicious interference of the contractual relationship between it and the trustee for the sale of the 750 shares. The act constituting the alleged wrongful interference is the letter (Complaint, Exhibit "G"), dated December 13, 1971, and containing the higher bid for the 750 shares, sent to the trustee by B & T. This claim is made on the assumption that the trustee's dealings with the partnership were bona-fide. Pennsylvania recognizes the tort, as stated in § 766 of the *Restatement of Torts* (1939 Ed.) of interference with a contractual relationship or with a prospective contractual relationship. *See, Glenn v. Point Park College,* 441 Pa. 474, 272 A. 2d 895 (1971). In addition to the heavy burden placed upon the partnership of establishing this tort (*Barlow v. Brunswick Corporation,* 311 F. Supp. 209 (E. D. Pa., 1970)), which it has not met up to this point, it must meet and overcome the antitrust counterclaim asserted against it by defendant B & T. The partnership is not entitled to summary judgment under Counts III and IV.

The basis for the motion of B & T, Lee and Tafel is that, even assuming a valid enforceable contract between the partnership and trustee, they were privileged to submit the higher bid. They say in their brief and not by way of affidavit that, except for the trustee's 750 shares, all of the remaining stock of B & T was held by the Tafel family and has been so held for a number of years and that the two directors, not knowing who had been invited to bid for the 750 shares, felt obliged to submit a bid to protect the economic interest of the family stockholders and the corporation itself. Whether they were privileged under the circumstances is a question of fact. The partnership must be given an opportunity, at least, to show that they were not privileged. The motion of B & T, Lee and Tafel for summary judgment under this heading will also be denied.

V. Plaintiffs' Motion That B & T Be Declared a Trustee *Ex Maleficio.*

The partnership's request that B & T be declared a trustee *ex maleficio* in its favor will be denied. A trust "*ex maleficio*" is another expression for a constructive trust. 38 P. L. E. *Trusts*, § 101. A constructive trust will be declared by the Pennsylvania courts "where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it." *Gray v. Liebert, et al.*, 357 Pa. 130, 135, 53 A. 2d 132, 135 (1947). Also see *Truver v. Kennedy*, 425 Pa. 294, 229 A. 2d 468 (1967). The burden of establishing the existence of facts upon which a constructive trust will be declared is on the one who seeks such a declaration. *In re Haftman's Estate*, 30 D. & C. 2d 4 (C. P. Wash. Co. 1962). Beyond those facts alleged in support of the contractual-relations-interference claim, there are no facts of record to support the request that

B & T be declared a trustee "*ex maleficio*" of title to the 750 shares for the benefit of the partnership. Ordinarily, the redress for the contractual-interference claim is the award of damages for the deprivation of the advantage or the benefit which the plaintiffs would have gained under the contract. I see no valid reason at this juncture for departing from that form of redress. In any event, the partnership has not met its burden regarding the interference claim.

Accordingly, the motion of defendant Landsburg for summary judgment of dismissal of the claims under Counts I and II of the complaint will be granted; all the other motions will be denied.

ORDER.

AND NOW, TO WIT, this 30th day of January, 1973, it is ORDERED as follows:

(1) *Under Counts I and II of the Complaint,* (a) the motion of defendant Leonard Landsburg for summary judgment of dismissal is *granted;* (b) the motion of plaintiffs for summary judgment in their favor is *denied;*

(2) *Under Counts III and IV,* (a) both the motion of defendants Boericke & Tafel, Inc., Donald Lee and Gustav H. Tafel, Jr., for summary judgment of dismissal and that of plaintiffs for summary judgment in their favor are *denied;* (b) the motion of plaintiffs for summary judgment of dismissal of the counterclaim of defendants Boericke & Tafel, Inc., Donald Lee and Gustav H. Tafel, Jr., is *denied;*

(3) *Under Counts V and VI,* both the motion of defendant Leonard Landsburg for summary judgment of dismissal and that of the plaintiffs for summary judgment in their favor are *denied;* and

(4) Plaintiffs' motion that defendant Boericke & Tafel, Inc., be declared a trustee *ex maleficio* as to the 750 shares of stock is *denied.*

BY THE COURT:

LOUIS C. BECHTLE, *J.*

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 73-1284

FORREST MURPHY, VIRGINIA W. MURPHY, FORREST J. MURPHY, JERRY J. MURPHY, and MARY V. MURPHY, doing business as UTAH OIL LAND COMPANY, a partnership,

Appellants

v.

LEONARD LANDSBURG, individually and as Trustee of the Estate of Adolph L. Tafel, Deceased,

BOERICKE & TAFEL, INC., a Pennsylvania corporation,

DONALD LEE,

GUSTAV H. TAFEL, JR.

(D. C. Civil Action No. 72-278)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued October 24, 1973

Before BIGGS, GIBBONS, and ROSENN, *Circuit Judges*

VICTOR WRIGHT, ESQUIRE
Fox, Rothschild, O'Brien & Frankel
for appellant

J. STOKES ADAMS, III, ESQUIRE
Hart Childs Hepburn Ross & Putnam
for Boericke & Tafel, Inc.,
D. Lee & G. H. Tafel
JAMES FRANCIS LAWLER, ESQUIRE
Ostroff & Lawler
for appellee

OPINION OF THE COURT

(Filed December 28, 1973)

ROSENN, *Circuit Judge*

This is an appeal from an order of the United States District Court for the Eastern District of Pennsylvania granting defendant's motion for summary judgment on two counts of plaintiffs' six-count complaint. Plaintiffs, Forrest Murphy, Virginia W. Murphy, Forrest J. Murphy, Jerry J. Murphy, and Mary V. Murphy, d/b/a Utah Oil Land Company (Murphy) [1] brought this diversity action alleging various causes of action against four defendants. This appeal involves the first two counts of the complaint, charging one of the four named defendants, Leonard Landsburg (Landsburg), both individually and as Trustee of the Estate of Adolph L. Tafel, with breach of contract.[2] After considering the contentions of the parties, we affirm the judgment of the district court.

In April 1971 Landsburg, as trustee of the Estate of Adolph L. Tafel, deceased, owned 750 shares of the common stock of Boericke & Tafel, Inc. (B&T). These shares constituted 54.94% of the outstanding stock of the cor-

1. The negotiations in behalf of the plaintiffs were conducted by Forrest Murphy.

2. In the first two counts, Murphy requested, in an amended complaint, both damages and injunctive relief. We have jurisdiction to hear this appeal under 28 U. S. C. § 1292(a)(1).

poration. Under the by-laws of B&T, 60% of the common stock was required for control.

By written proposal dated July 7, 1971, Murphy submitted an offer to Landsburg to purchase all of the outstanding shares of B&T at a price of $240 per share. The offer provided that payment would be made within one week "after the effectuation of full operating control of the business by the purchasers" and additionally, that:

> If the number of shares tendered in response hereto is less than the number of shares required to effect a complete liquidation of the B&T Corporation then this offer may be declared by the purchasers to be null and void.

The offer stated it was to be effective until August 16, 1971, subject to extension at the option of the purchaser.

Two days later Landsburg, acting through his attorney, accepted by letter the offer as to the 750 shares held by the Trust at a price of $250 per share. Landsburg additionally agreed to tender Murphy's proposal to all B&T minority shareholders "to make [Murphy's] proposal effective." The acceptance was subject to the approval of the Orphans' Court of Philadelphia County.

Murphy's written reply, dated July 13, 1971, confirmed the new price of $250 per share and the condition of Orphans' Court approval.

In an effort to acquire a controlling interest in B&T, Landsburg, on July 30, 1971, made a tender offer to purchase the stock of the minority stockholders of B&T. He was unsuccessful in securing any affirmative response.

By letters dated August 9, September 13, and November 2, 1971, Murphy ultimately extended the expiration date of the proposal to December 1, 1971.

On November 23, 1971, Murphy telephoned Lawler, Landsburg's attorney, and told him that he did not want to

delay the closing any further and was prepared to purchase the 750 shares of B&T stock for $187,500 and waive the condition of control. Although disputed, Lawler claimed that he told Murphy to put the waiver in writing. Landsburg subsequently received a letter dated November 23, 1971, in which Murphy wrote:

> With reference to the 750 shares of Boericke & Tafel, Inc. common stock owned by the Adolph L. Tafel Trust, I hereby extend until January 15, 1972, the closing of the agreement formed by my proposal of July 7, 1971 and your acceptance thereof dated July 9, 1971.

On December 1, 1971, Landsburg mailed out solicitations for sealed bids to several parties, including Murphy, for the sale of the Trust's 750 shares of B&T stock. By letter dated December 3, 1971, Murphy, through his attorney, informed Landsburg of his desire to complete the purchase of the 750 shares at a price of $187,500 and of his waiver of the condition requiring corporate control. Enclosed was a cashier's check for $37,500 representing the first of five annual payments under his initial proposal. Landsburg received an additional bid for the purchase of the 750 shares in the amount of $221,000 from Donald Lee, president of B&T, on behalf of the corporation.

By letter dated December 13, 1971, Landsburg notified Murphy that he had sold the 750 shares to B&T at a higher price and returned Murphy's cashier's check. One week later, Landsburg filed a petition with the Orphans' Court. His petition described the initial transaction with Murphy and the later negotiations with B&T and requested that in the interest of the Trust, the sale to B&T be approved. Murphy filed objections to Landsburg's petition. On January 4, 1972, a hearing was held at which Murphy appeared and participated. He testified and vigorously argued that

he had a binding contract with Landsburg for the purchase of the 750 shares which preceded any subsequent contract with B&T. He acknowledged, however, that in late October 1971, when Landsburg offered to sell him the 750 shares without corporate control, he refused. He additionally argued that Landsburg's agreement to sell his 750 shares to B&T was not in the best interest of the Trust because, although B&T offered a higher purchase price, payment was spread over a period of several years and security for the payment of the purchase price was inadequate.

On February 15, 1972, the Orphans' Court approved the sale of the 750 shares to B&T. Murphy took no exceptions to that decree nor did he lodge any appeal with the Supreme Court of Pennsylvania. One week prior to the Orphans' Court decree, Murphy filed his complaint in the instant case seeking, inter alia, an injunction and damages for breach of contract.[3]

On appeal Murphy contends, as he did before the Orphans' Court, that had a binding contract with Landsburg to purchase the Trust's 750 shares of B&T stock subject only to the approval of the Orphans' Court. The obligation to secure Orphans' Court approval, Murphy further contends, was expressly assumed by Landsburg and was implicitly governed by a duty to act in good faith. Landsburg's alleged breach consisted of his solicitation of higher bids while under an obligation to submit Murphy's offer to the Court for approval.

At the outset we are confronted by the contention, urged by Landsburg, that the present action is barred by the doctrine of res judicata. Landsburg argues that both because the "gist" of Murphy's claims before the Orphans'

3. Although the sale had been approved to B&T by the Orphans' Court, Landsburg, as of the date of the application for the preliminary injunction, continued to hold the share certificates as security for the purchase price.

Court and the district court arise out of the same set of operative facts and because the relief requested in both courts was similar, Murphy is barred from instituting the present suit.

Section 68 of the Restatement of Judgments (1942) provides:

> (1) Where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action . . .
>
> (2) A judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of fact not actually litigated and determined in the first action.

Comment (a) to Section 68 distinguishes the doctrines of res judicata and collateral estoppel. The former applies when the subsequent cause of action is identical to the original action. Its scope is broad—the original judgment is conclusive not only as to matters actually raised and litigated but also as to matters that could have been raised and litigated. The latter, collateral estoppel, applies when the subsequent cause of action differs from the original cause of action. Its scope is more limited. Only matters "actually litigated and determined by the [original] judgment" may collaterally estop a party in a subsequent proceeding. *See* 1B Moore's Federal Practice § 0.441[2], at 3777 (2d Ed. 1965).[4]

4. Because jurisdiction is based on diversity of citizenship, we apply the law of Pennsylvania with respect to a plea of res judicata or collateral estoppel. Blum v. William Goldman Theatres, 174 F. 2d 914 (3d Cir. 1949). Pennsylvania follows the Restatement on Judgments, Section 68, as to the rule of collateral estoppel. Thal v. Kravitz, 365 Pa. 110, 73 A. 2d 376 (1950).

A comparison of the action before the Orphans' Court with the instant action reveals that this case is more appropriately dealt with under the doctrine of collateral estoppel than res judicata. The petition before the Orphans' Court essentially sought approval of a contract between Landsburg and B&T. It was not, as is the present action, a suit for damages for breach of contract between Landsburg and Murphy. While Murphy did appear in the Orphans' Court proceeding and raised the question of the existence of a contract between himself and the Trustee, the two proceedings involved different objectives and relief.

Even under the more limited doctrine of collateral estoppel, however, we believe that the decree of the Orphans' Court approving the sale of stock to B&T precludes Murphy from arguing that Landsburg breached an outstanding obligation. The essence of the present breach of contract action lies in Murphy's contention that Landsburg solicited higher bids while under a contractual duty to submit his proposal to the Orphans' Court. This contention was disposed of in the course of the proceedings before that court.[5]

5. Landsburg denied that he was under any obligation to Murphy on December 1, 1971, the date he mailed out solicitations for bids. He contended that any obligation regarding the Trust's 750 shares was subject to the condition precedent that Murphy be given operating control of B&T. Murphy did not allege that Landsburg was ever in a position to offer Murphy sufficient shares to effect corporate control. Nor did Murphy contend either that he was unaware of Landsburg's inability to deliver control or that Landsburg failed to exercise good faith in his effort to secure control. Landsburg argued that as of December 1 that condition was neither satisfied nor effectively waived. He contended that Murphy's letter of November 23 did not waive the condition and that he construed it as another (fourth) effort to unilaterally extend the original conditional proposal. On December 1, Landsburg, considering himself under no obligation to accept the new extension, elected to solicit bids having allegedly given prior notice thereof to Murphy. On December 8, after Landsburg had solicited bids, he received Murphy's letter dated December 3 waiving the condition.

The Orphans' Court was presented with the question of which of two assumedly outstanding contracts was in the best interest of the Estate and ruled in favor of the higher B&T offer. In approving this bid, the Court in effect made an adjudication that Landsburg had no prior binding agreement with Murphy for the sale of stock and additionally rejected Murphy's argument concerning the adequacy of security for the purchase price. While the Court did not expressly rule on the question of whether Landsburg breached an obligation to seek Orphans' Court approval of Murphy's offer at the time he, Landsburg, solicited bids, we believe that such a ruling can be fairly implied.

An examination of the record of the Orphans' Court proceedings reveals that Murphy raised before that Court precisely the contention urged in the present action. The record reveals that the substance of the entire stock transaction with Murphy, including the negotiations, conditional proposal, conditional acceptance, and all other relevant facts were presented to the Orphans' Court. Murphy and Landsburg personally appeared and participated in the Orphans' Court proceedings and each testified concerning the transaction. The position of the parties in the district court and in the Orphans' Court is essentially the same, Murphy asserting the existence of an obligation by Landsburg to submit Murphy's proposal to the Court before soliciting any other bids, and Landsburg denying it. Murphy strenuously argued that the Trustee's solicitation of bids was "improper and illegal." Had the Court found that at the time of solicitation Landsburg was under an

5. (Cont'd.)

It does not appear that the district court ruled on the question of whether Landsburg was under a binding obligation to submit Murphy's proposal to the Orphans' Court. In view of the lack of factual findings on the issue and because of our disposition of this case on the ground of collateral estoppel, we decline to rule on this matter.

obligation to Murphy we doubt it would have approved the offer of another party knowing that such approval might have the effect of subjecting the Estate to damages for breach of the prior agreement.

Murphy argues that the Orphans' Court decree is not binding on him because he brought this action in the district court one week before the Orphans' Court entered its order. This contention is without merit. To be given res judicata or collateral estoppel effect, a judgment need not be entered prior to the commencement of the action in which the binding effect of the judgment is sought. *Goldstein v. Ahrens*, 379 Pa. 330, 108 A. 2d 693 (1954); *see*, Restatement of Judgments § 43; 1B Moore's Federal Practice ¶ 0.405[1], at 627 n. 25 (2d Ed. 1965).

The judgment of the district court will be affirmed. Each party will bear its own costs.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 73-1284

FORREST MURPHY, VIRGINIA W. MURPHY, FORREST J. MURPHY, JERRY J. MURPHY AND MARY V. MURPHY, DOING BUSINESS AS UTAH OIL LAND COMPANY, A PARTNERSHIP,

Appellants

v.

LEONARD LANDSBURG, INDIVIDUALLY AND AS TRUSTEE OF THE ESTATE OF ADOLPH L. TAFEL, DECEASED,

BOERICKE & TAFEL, INC., A PENNSYLVANIA CORPORATION

DONALD LEE,

GUSTAV H. TAFEL, JR.

(D. C. Civil Action No. 72-278)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: BIGGS, GIBBONS and ROSENN, *Circuit Judges*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed January 31, 1973, be, and the same is hereby affirmed. Each party will bear its own costs.

ATTEST:

THOMAS F. QUINN,
Clerk.

December 28, 1973